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No. 95-160

In the Supreme Court of the United States

OCTOBER TERM, 1995

GOLD COAST PUBLICATIONS, INC. AND
NEW TIMES, INC.,
Petitioners

v.

THE CITY OF CORAL GABLES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), requires remand of this case for reconsideration of whether the uniform color and lettering size provisions in the City of Coral Gables' ordinance regulating newspaper vending machines violate petitioners' First Amendment rights.

PARTIES

Petitioners are listed on page ii of the petition. Petitioners' list of respondents is incorrect. Pet. ii. The following persons were originally named as defendants in petitioner Gold Coast Publications, Inc.'s complaint, but they were dismissed by the district court and were not parties in the court of appeals: George M. Corrigan, Mayor of Coral Gables; James Barker, Vice Mayor; William H. Kerdyk, Bob Hildreth, and Wayne "Chip" Withers, City Commissioners; the Coral Gables City Commission; and Alan L. Richman, the Code Enforcement Officer. *See* Pet. App. 7a n.7. Accordingly, under this Court's Rule 12.4, the City of Coral Gables is the only proper respondent in this Court. The caption on this brief has been corrected to reflect this fact.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	5
I. THE FIRST AMENDMENT DOES NOT CREATE A RIGHT TO HAVE NEWSPAPER VENDING MACHINES OF SPECIFIC COLOR AND LETTERING SIZE	5
II. THE DECISION IN *COORS* IS NOT RELEVANT TO THIS CASE	8
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Adderley v. Florida, 385 U.S. 39 (1966) 7
Berman v. Parker, 348 U.S. 26 (1954) 7
Board of Trustees v. Fox, 492 U.S. 469 (1989) 9
City of Cincinnati v. Discovery Network, Inc., —— U.S. ——, 113 S. Ct. 1505 (1993) 6, 8
City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 4, 6, 7, 8
Florida Bar v. Went For It, Inc., —— U.S. ——, 115 S. Ct. 2371 (1995) 9
Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 7, 11
Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) 7, 9, 11
Posada De Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 11
Rubin v. Coors Brewing Co., —— U.S. ——, 115 S. Ct. 1585 (1995) ..... i, 5-6, 8, 10, 11

STATUTES

Code of the City of Coral Gables, Florida, § 22-164 2

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent the City of Coral Gables, by its undersigned counsel, submits this brief in opposition to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

This case arose from the violation by petitioner Gold Coast Publications, Inc. ("Gold Coast") of an ordinance regulating newspaper vending machines ("newsracks") on public rights of way in the City of Coral Gables, Florida ("the City"). The City adopted the newsrack ordinance ("the Ordinance") to regulate the growing number of newsracks in the City and continue its efforts to promote

aesthetics in planning and development. Before adopting the Ordinance, the City created a task force to study methods of improving the City's appearance, including the regulation of newsracks on public streets and sidewalks. After studying the issue, the task force developed a proposed ordinance to regulate newsracks and revised it several times in accordance with input from newspaper publishers and public hearings. The most recently revised version of the Ordinance (Ordinance No. 2911, adopted May 15, 1990, as amended by Ordinance No. 2984, adopted March 31, 1992) is at issue in this case. The Ordinance applies equally to all newsracks on city streets and requires, among other things, uniform design, size, and color of newsracks. Pet. App. 55a-75a.

Although petitioners at one time challenged numerous portions of the Ordinance, the only section that remains at issue is § 22-164 (Pet. 2), which regulates the color of newsracks as well as the size of the lettering on the outside of each newsrack that identifies the newspaper contained therein. In an attempt to preserve the traditional Mediterranean appearance of the City, the Ordinance requires that all newsracks on public streets and sidewalks be beige and brown in color and that the newspaper's name on each newsrack be printed in letters no more than an inch and three-quarters in height. These requirements apply equally to all newsracks on public streets and sidewalks in the City. They, of course, impose no restriction whatever on the content of the newspapers being distributed through newsracks.

Gold Coast is a newspaper publisher that publishes *Exito*, a weekly Spanish-language newspaper distributed in the City. The newsracks distributing *Exito* were painted deep purple and prominently displayed the *Exito* logo in lime green, bright orange, or hot pink. The *Exito* newsracks thus clearly violated the Ordinance's regulations regarding color and lettering size.

Finding that the newsracks containing *Exito* were not in compliance with the Ordinance, the City notified petitioner Gold Coast on November 26, 1991, that the newsracks needed to be brought into compliance within thirty days or the City would remove them. Despite the City's fifteen-day extension of the deadline for compliance, Gold Coast did not bring its newsracks into compliance with the Ordinance, and six newsracks were removed by the City on January 17, 1992.[1]

In response to the City's removal of its newsracks, Gold Coast brought this action against the City and a number of its officials seeking, *inter alia*, injunctive relief against enforcement of the Ordinance. Petitioner New Times, Inc., which already was challenging the constitutionality of the Ordinance in a pending state court action, intervened as an additional plaintiff.[2] Gold Coast's amended complaint contained eleven counts alleging, on the basis of various theories, that Gold Coast's constitutional rights were violated by nine separate sections of the Ordinance. All of these arguments, save the one about color and size of lettering, have now been abandoned.

The district court rejected most of Gold Coast's arguments and sustained the validity of all but two of the Ordinance's provisions. The two exceptions were the provision regarding color and lettering size that petitioners challenge here and another provision that requires newsracks to be of a particular make and model or its "equivalent." Pet. App. 37a, 51a. With respect to the provision governing color and the size of lettering, the court held that it is not narrowly tailored to advance the City's legitimate interest in aesthetics and therefore is unconstitu-

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[1] The City informed Gold Coast that the newsracks would be returned upon payment of $50 per newsrack.

[2] Contrary to petitioners' statement, New Times, Inc.'s publication, *New Times*, is not "the only general circulation English-language alternative to the Miami Herald in the Miami metropolitan area." *See* Pet. 2.

tional. Pet. App. 50a. With respect to the provision governing the make and model of newsracks, the court ruled that the use of the term "equivalent" leaves too much discretion in the hands of city officials evaluating a newsrack's compliance with the Ordinance and that the provision therefore is invalid. Pet. App. 40a. The court enjoined the City from enforcing these two provisions of the Ordinance, and left the remainder of the Ordinance intact.

Petitioners and the City both appealed. The court of appeals upheld the Ordinance in its entirety. The court affirmed without difficulty the district court's rejection of the vast majority of petitioners' claims. Pet. App. 26a. The court also reversed the district court's grant of injunctive relief as to the provisions regarding color, lettering size, and the use of "equivalent" newsracks. Pet. App. 25a. The court concluded that the color and lettering size provisions are narrowly tailored to advance the City's aesthetic goals, and it explicitly rejected the district court's holding to the contrary. The court also stated that the discretion allowed by the use of the term "equivalent" is limited "through neutral criteria and procedural safeguards set forth in the text of the Ordinance," thus distinguishing the Ordinance from the regulation rejected in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). Pet. App. 24a.

ARGUMENT

The court of appeals' decision is correct, and further review is not warranted. Petitioners seek a remand in purported reliance on the reasoning of *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), but that decision is irrelevant to this case and does nothing to undermine the decision of the court of appeals. *Coors* is easily distinguishable because that case involved a restriction on the content of speech. In contrast, the Ordinance at issue in this case does nothing to restrict petitioners' right to free speech or expression; it only regulates the physical appearance of newsracks.

Although the court of appeals' opinion makes clear that the Ordinance does not violate the First Amendment under either commercial or noncommercial speech standards (Pet. App. 1a-26a), there is no need for an extended First Amendment discussion in this case. Understandably, the court of appeals addressed each of petitioners' arguments, but the issue here is not as complicated as petitioners have sought to make it. The disputed provision of the Ordinance does not affect petitioners' First Amendment rights in any way. Neither petitioners' expression of their views nor their ability to distribute through newsracks is restricted. The disputed provision is a content-neutral regulation of the color and lettering of newsracks, and the City was well within its authority to adopt it.

I. THE FIRST AMENDMENT DOES NOT CREATE A RIGHT TO HAVE NEWSPAPER VENDING MACHINES OF SPECIFIC COLOR AND LETTERING SIZE

The First Amendment's free speech guarantee protects the expression of ideas, not the color of newsracks. Petitioners contend that the color of newsracks and the size of lettering on newsracks are protected by the First Amendment as commercial speech. The characterization of newsrack color and lettering size as commercial speech is critical to petitioners' position because *Rubin v. Coors*

Brewing Co., 115 S. Ct. 1585 (1995), is premised on the regulation of commercial speech. But the Ordinance does not affect petitioners' right to free speech in any way. The Ordinance does not regulate the content of petitioners' newspapers, it does not prohibit petitioners from distributing their newspapers through newsracks, and it does not discriminate against particular newspapers or kinds of newspapers in favor of others. The disputed section of the Ordinance merely contains a reasonable restriction on the color of newsracks and the size of lettering that may appear on them.

This Court has never suggested that a city may not regulate the color of newsracks or the lettering size on newsracks. On two occasions, this Court has invalidated regulations applying to newsracks, but the regulations at issue in those cases were far different from the Ordinance at issue here. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). In *Discovery Network*, the Court invalidated a regulation that discriminated between newsracks containing commercial handbills and newsracks containing newspapers. 113 S. Ct. at 1516-17. The discrimination was based on the content of the materials being distributed. *Id.* In *City of Lakewood*, the Court held that the regulation created the possibility of content-based discrimination because it gave the mayor unlimited discretion in granting exceptions to the City's general prohibition of newsracks on public sidewalks. 486 U.S. at 772. The Ordinance here presents neither of these problems nor any other restrictions or potential restrictions of expression. As the court of appeals correctly held, the Ordinance does not suffer from the problems identified in *Discovery Network* and *City of Lakewood* because it is not content-based and does not allow city officials excessive discretion in applying its provisions. Pet. App. 13a-14a, 24a. In the absence of any provision that even arguably restricts expression, no First Amendment concern is presented.

It is well-settled that a state or local government, "no less than a private owner of property, has power to preserve the property under its control for the use of which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). Further, this Court has consistently acknowledged that state and local governments may legitimately exercise their police powers to preserve or improve their aesthetic environments. *See, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (referring with approval to content-neutral regulation of billboards based on aesthetic interests); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding prohibition of signs posted on public property); *Berman v. Parker*, 348 U.S. 26 (1954) (confirming the power of a legislature to remove blighted housing). A majority of the Court in *Metromedia* acknowledged that a city's interest in limiting visual clutter would justify a content-neutral regulation of billboards. 453 U.S. at 507-508 (plurality opinion); *id.* at 552 (Stevens, J., dissenting in part); *id.* at 559-561 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting). Similarly, in *Taxpayers for Vincent*, the Court held that a prohibition on the posting of signs on public property was constitutional and recognized that a city "may legitimately exercise its police powers to advance aesthetic values." 466 U.S. at 805.

This Court's decisions thus clearly support a city's authority to adopt a content-neutral regulation that advances the city's aesthetic goals and does nothing to abridge expression. Such a regulation, like the one at issue here, does not implicate any of the interests protected by the First Amendment. Indeed, both the Court's opinion in *City of Lakewood* and the dissent in that case make clear that a city may adopt content-neutral regulations governing newsracks. 486 U.S. at 760, 773. In the dissent's words, "[i]t is only common sense that cities be allowed to exert some control over those who would permanently appropriate city property for the purpose of erecting a newspaper dispensing device." *Id.* at 773 (White, J., dissenting).

In fact, the Court's various opinions in *Discovery Network* and *City of Lakewood* strongly suggest that a complete ban on newsracks would be permissible. Several Justices in *City of Lakewood* explicitly stated that cities could prohibit newsracks altogether because "[t]here is no constitutional right to place newsracks on the city sidewalks over the objections of the city." 486 U.S. at 784. The majority did not disagree, basing its ruling on the more limited rationale that the regulation at issue allowed the mayor too much discretion in granting newsrack permits. *Id.* at 772. Similarly, in *Discovery Network*, several Justices stated, without disagreement by the majority, that a total ban on newsracks would be constitutional: "In my view, the city may order the removal of *all* newsracks from its public right-of-ways if it so chooses." 113 S. Ct. at 1525 (Rehnquist, C.J., dissenting) (citing dissent in *City of Lakewood*). Particularly under these circumstances, an aesthetic regulation that does not discriminate on the basis of content does not violate the First Amendment.

II. THE DECISION IN *COORS* IS NOT RELEVANT TO THIS CASE

Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995), is irrelevant to the present case. The irrelevancy of *Coors* is clear not only because the regulations at issue here do not restrict petitioners' right to expression in any way, but also because, as the court of appeals recognized, the regulations are constitutional even when examined under the strictest First Amendment standards. *See* Pet. App. 14a-19a. The court of appeals' holding that the Ordinance survives even when tested against the strict standards governing regulation of noncommercial speech—a holding that petitioners do not challenge or even discuss—shows that *Coors*, a decision based on less demanding commercial speech standards, has no bearing on the present case. In fact, petitioners' arguments to the court of appeals did not even raise the issue of whether the Ordinance validly

restricts commercial speech; petitioners focused exclusively on challenging the regulations as restrictions on noncommercial speech, and their arguments were explicitly rejected by the court. The court undertook the commercial speech inquiry *sua sponte* and ruled that the Ordinance is valid whether measured against commercial or noncommercial speech standards, or both. Pet. App. 25a. Petitioners now challenge only the court's holding regarding commercial speech and ignore the fact that the court held that the regulations are valid even if viewed as restrictions on noncommercial speech, the kind of speech that is afforded the greatest First Amendment protection.

Petitioners' argument is predicated on the unstated but erroneous assumption that a regulation that satisfies the more stringent First Amendment standard, and qualifies as a reasonable "time, place, and manner" restriction on noncommercial speech, can nevertheless be held unconstitutional as an excessive restriction of commercial speech. Contrary to petitioners' suggestion, the court of appeals did not recognize or approve such a proposition. *See* Pet. 6 n.2. More important, this Court has never done so. In fact, this Court has recently reaffirmed that " 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (citation omitted), *quoted with approval in Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2375 (1995). The court of appeals explicitly recognized this fact and prefaced its commercial speech discussion by stating that "the First Amendment offers less protection to commercial speech than to noncommercial speech." Pet. App. 20a (citing *Metromedia*, 453 U.S. at 505-06). It follows *a fortiori* that regulations that are found to be valid restrictions on noncommercial speech cannot be challenged as unconstitutional restrictions on commercial speech.

In any event, even if this Court were to review the Ordinance under the commercial speech standards applied in *Coors* and earlier cases, the Ordinance would pose no constitutional problem. The regulation at issue here is readily distinguishable from the statutory provision in *Coors*. That provision, § 5(e)(2) of the Federal Alcohol Administration Act of 1935, prohibited beer labels from disclosing alcohol content. The regulation thus restricted the content of speech. In contrast, the regulation being challenged here is content-neutral and is completely unrelated to speech or the content of petitioners' newspapers.

Because the regulation in *Coors* restricted the content of beer manufacturers' expression, the Court held that it was an unconstitutional restriction on commercial speech. 115 S. Ct. at 1594. By contrast, the City's Ordinance only regulates the physical appearance of newsracks. It does not restrict expression in any way. Despite petitioners' claims, the color of their newsracks and the height of the lettering on newsracks do not qualify as expression warranting First Amendment protection.

Coors is further distinguishable because the Ordinance at issue here does not contain the kind of internal inconsistencies that contributed to the Court's decision invalidating the statutory prohibition against disclosing alcohol content on beer labels. The government argued that the ban against such disclosure helped prevent "strength wars" among beer manufacturers, but other provisions of the statute directly undermined this goal by allowing, and sometimes requiring, other methods of disclosing alcohol content. 115 S. Ct. at 1592. The Court reasoned that these internal inconsistencies prevented the advancement of the government's interest, undermined the government's justification for the restriction, and thus supported the conclusion that the challenged statute violated the manufacturer's free speech rights. *Id.* at 1592-94. The Ordinance at issue here does not contain any such inconsistencies.

The Ordinance's "partial solution" to the City's aesthetic concerns applies to all newsracks on city streets and is neither irrational nor inconsistent with the City's aesthetic goals. Unlike the regulation in *Coors*, the Ordinance clearly advances the City's legitimate interests.

Contrary to petitioners' assertions, *Coors* did not hold that partial measures addressing aesthetic concerns violate the First Amendment. *See* Pet. 8-10. *Coors* does not require that cities regulate every object on their streets in order to regulate one particular class of objects. If that were the case, cities would soon be paralyzed by the burden of being required to adopt comprehensive regulations for every problem facing them. In fact, this Court has approved partial solutions to a city's aesthetic concerns. *Taxpayers for Vincent*, 466 U.S. at 811; *Metromedia*, 453 U.S. at 511-12. In both *Taxpayers for Vincent* and *Metromedia*, the Court stated that partial, content-neutral regulations, such as the one at issue in this case, can advance a city's legitimate interest in aesthetics. *Id.* Moreover, this Court has stated in other contexts that a legislature is free to proceed in a stepwise manner, to address one or more aspects of a problem at a time, without jeopardizing the validity of a regulatory action. *See, e.g., Posada De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986) (rejecting "underinclusive" argument and upholding a partial restriction on gambling advertising that advanced the legislature's interests). The Ordinance at issue here rationally advances the aesthetic interests of the City and does not affect, much less violate, petitioners' First Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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